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IN THE

Supreme Court of the United States

October Term, 1961

No. 303

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation,
Petitioner,

v.

MacDONALD GALLION, Attorney General of Alabama; MRS. BETTYE FRINK, Secretary of State, State of Alabama.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on May 15, 1961.

Opinions Below

The memorandum opinion of the District Court (R. 149) is reported at 190 F. Supp. 583. The opinion of the Court of Appeals (R. 164-181) is appended hereto, *infra*, at page 19, and is not yet reported.

Jurisdiction

The judgment of the Court of Appeals (R. 182) was entered on May 15, 1961 (and is appended hereto, *infra*, at page 33). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether petitioner, whose basic purpose is the elimination of racial discrimination throughout the United States, may properly invoke the jurisdiction of the federal courts for a determination of the organization's right to pursue its activities in the State of Alabama and to have state interference therewith enjoined, on a showing that: (1) an *ex parte* temporary restraining order and injunction barring petitioner from engaging in any organization activities and prohibiting it from taking any steps to qualify to do business in the State of Alabama has been in effect since June 1, 1956; (2) the right to a hearing to determine the legal and constitutional validity of the aforesaid order and injunction has been obstructed through a deliberate, purposeful and prejudicial use of state court process and procedures, despite petitioner's persistent efforts to be heard and two decisions of this Court ordering a hearing be afforded; and (3) little doubt exists that unless the federal court asserts jurisdiction, petitioner will not be granted a hearing on the merits in this cause in the foreseeable future?

Statement

Petitioner is a New York non-profit membership corporation, with its principal place of business located in New York, New York. It is engaged in the business of attempting through lawful and peaceful activity to eliminate racial discrimination as a pattern of American life. Petitioner's chartered affiliates, designated as Branches, have been active in Alabama since 1918, and prior to June 1, 1956, its Southeast Regional Office was located in Birmingham (R. 91). Petitioner sponsored activities throughout the State through this office, its affiliates and members, financed in part from the dues and contributions of citizens and residents of Alabama.

Petitioner does not dispute the charge that it had not complied with Title 10, §§ 192-194, Code of Alabama, 1940, or with Article XII, § 232, Constitution of Alabama, 1901, requiring foreign corporations to register with the Secretary of State, but this failure was based on its good faith belief that these provisions had no application to its activities.

Without any prior demand for compliance or notification that failure to register would subject the organizaiton to ouster proceedings (But see R. 96-97), the Attorney General, on June 1, 1956, obtained an *ex parte* temporary restraining order and injunction in the Circuit Court of the 15th Judicial Circuit, without notice or hearing. By this decree, petitioner was enjoined from registering as an out-of-state corporation and from engaging in any organizational activities (R. 26-27), pending a hearing on the State's bill of complaint, pursuant to which permanent dissolution of the organization and cessation of all of its activities and petitioner's permanent ouster from Alabama were sought (R. 25). The bill of complaint alleged that petitioner's activities were creating racial tensions and unrest (R. 22-23); and that petitioner had failed to register as required by the aforementioned constitutional and statutory provisions of the State (R. 24).

A hearing on the merits was scheduled for July 17, 1956 (R. 10). On July 11, 1956, however, the court entered an interlocutory decree requiring petitioner to produce various books, papers and documents requested, including disclosure of the names and addresses of all of petitioner's members and contributors (R. 10). On July 23, 1956, petitioner filed its answer to the bill of complaint. It denied that its activities were subject to Title 10, §§ 192, 193 and 194, Code of Alabama, 1940, but tendered the necessary registration forms and requested permission to file them with the Secretary of State, provided the circuit court would dissolve the order barring petitioner from registering (R. 10-12). This

request was denied. On July 25, 1956, petitioner was adjudged in contempt for refusing to comply with the interlocutory order entered on July 11, 1956, and was fined $10,000.00, with the proviso that if it did not comply with the court's order within five days, it would be fined $100,000.00 (R. 12).

On July 30, 1956, petitioner tendered substantial compliance with the interlocutory order but refused to produce a list of its members and contributors. Both the initial and subsequent refusals to disclose the names of petitioner's members and contributors were grounded on asserted rights to freedom of speech and association secured under the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 12). Application was made to the Supreme Court of Alabama for a stay pending the filing and disposition of a petition for writ of certiorari. That application was denied, but while it was still pending, the circuit court entered an order adjudging petitioner in further contempt and setting the fine therefor at $100,000.00 (R. 12).

One adjudged in contempt is foreclosed, under Alabama law, *Jacoby* v. *Goetler Weil & Co.*, 74 Ala. 427, from obtaining a hearing on the merits until he has purged himself of contempt (R. 12-13). Thus, petitioner was not only adjudged in contempt and fined, but was faced thereby with the choice of foregoing the right and opportunity to contest the validity of the extant *ex parte* temporary restraining order and injunction, or waiving its claim in respect to the unconstitutionality of the production order on which the contempt adjudication had been based.

The judgment of contempt was reviewed by this Court and reversed in June, 1958. No decision on the validity of the temporary restraining order and injunction was rendered, however, since the Court was of the view that since petitioner was no longer in contempt, there was no bar to an early hearing in the state courts on the validity of that decree. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449.

On remand, however, the Supreme Court of Alabama did not act on the mandate of this Court until January, 1959, despite the filing by petitioner of repeated motions requesting it to send the mandate down. Then the court again affirmed the contempt adjudication and fine of $100,000 (109 So2d 138), this time on the ground that petitioner had failed to comply with provisions of the circuit court's order, other than those disposed of by this Court (R. 13). Petitioner was forced to seek review by this Court once again, and filed petitions for writ of certiorari and/or mandamus. On June 8, 1959, the judgment of the Supreme Court of Alabama was reversed a second time. The Court refused to entertain the petition for writ of mandamus on the theory that the state judicial machinery would now move promptly to accord petitioner a hearing on the merits. *N.A.A.C.P.* v. *Alabama*, 360 U. S. 240. Petition for rehearing was denied on October 12, 1959 (R. 13-14). 361 U. S. 856.

Immediately following this latter decision, petitioner filed a number of motions in the State Supreme Court requesting that court to send down this Court's mandate to the circuit court so that petitioner could finally secure its long delayed hearing on the merits (R. 14). On November 19, 1959, petitioner, through its counsel, was advised by the Clerk of the Supreme Court of Alabama that no subsequent motions to send the mandate down would be filed "since they serve no useful purpose," and that the "case will receive attention as soon as practicable, commensurate with the rest of the important business of the Court" (R. 98-99).

No action was taken, however, to release the mandate or to order the lower court to hear the case on the merits. Petitioner sought a hearing in the circuit court, but its motion therefor was denied (R. 99-103). On June 23, 1960, petitioner instituted the instant proceedings in the United States District Court for the Middle District of Alabama (R. 2). Finally, on July 11, 1960, some three weeks after

these proceedings had been commenced and two days before a hearing on this cause was scheduled to take place, the Supreme Court of Alabama released the long delayed mandate (R. 147-148). The order on the mandate specified that the *ex parte* temporary restraining order and injunction, then operative for over four years, was to remain in full force and effect pending final determination of the cause on the merits. Since that time the state courts have made no effort to set the matter down for a hearing on the merits, despite decisions of the United States District Court, filed August 11, 1960 (R. 149), and of the Court of Appeals, entered on May 15, 1961, refusing petitioner relief on the theory that a prompt hearing in the state courts would be forthcoming.

In April, 1958, prior to the first decision of this Court in *N.A.A.C.P.* v. *Alabama, supra*, a second contempt action was instituted against petitioner (R. 110-112). The basis for this proceeding was that petitioner had continued to do business in the State under a different name, in violation of the temporary restraining order and injunction (R. 104-109). A hearing was held on the new charges which were based entirely upon "information and belief," but no final determination was reached, and the matter has been continued to the present date (R. 15).

On August 11, 1960, the District Court, in a memorandum opinon, concluded that while no serious question as to federal jurisdiction existed, this was not a proper case for its exercise; that to grant the relief requested would have to be based upon an assumption that Alabama officials would not abide by the obligations of their office to protect the constitutional rights of all of its citizens (R. 151-155). For these and other reasons, the District Court dismissed the action (190 F. Supp. 593).

On appeal the Court of Appeals vacated and remanded the cause by a divided vote. The majority determined that

the matter should be litigated in the state courts, but ordered the District Court to retain jurisdiction while petitioner pursued the state remedy (R. 164-177). Judge Tuttle was of the view that the District Court "should have proceeded to a hearing on the merits of the complaint without requiring [petitioner] to participate further in the fiction that it had an opportunity to have a reasonably prompt hearing in the State courts." For that reason he dissented in part (R. 178-181). From the judgment of the Court of Appeals, petitioner brings the cause here.

Reasons for Allowance of the Writ

1. The decision below is in direct conflict with this Court's decision in *Hawkins* v. *Board of Control*, 355 U. S. 839. In *Hawkins*, when it was clear that the state judiciary would not enter a decree vindicating Hawkins' constitutional rights to equal educational opportunities in accord with decisions of this Court, Hawkins was advised, in effect, to abandon his fruitless efforts in the state courts and seek his remedy in the federal courts.[1] The situation here is as blatant a frustration of basic rights as that which existed in *Hawkins*. Petitioner has been ousted from the State of Alabama without notice or hearing since June 1, 1956, thereby being deprived of property and of the right to engage in lawful organizational activities in the State without due process of law; subjected to penalties not accorded any other foreign corporation, in derogation of the equal protection of the laws mandated by the Fourteenth Amendment; and denied access to the courts, in violation of

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[1] See 47 So2d 608 (1950); Id. 50 So2d 116 (1951), cert. denied, 342 U.S. 877, for want of a final judgment; Id. 60 So2d 162 (1952), cert. granted, 347 U.S. 971, and judgment vacated and remanded for reconsideration in the light of Brown v. Board of Education, 347 U.S. 483; Id. 83 So2d 20 (1955), cert. denied, 350 U.S. 413, but prior mandate recalled and certiorari granted on ground that Hawkins was entitled to prompt admission to graduate school; Id. 93 So2d 354 (1957), cert. denied, 355 U.S. 839, but without prejudice to Hawkins' seeking relief in an appropriate United States District Court.

Article III, Section 2, of the Constitution of the United States. Moreover, its members are deprived of the right to associate with like-minded persons under petitioner's aegis in order to advance the cause of nondiscrimination, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Prior to hearing on the validity of the original ouster order, petitioner was adjudged in contempt, which under Alabama law divested it of the right to a hearing on the merits. *Jacoby* v. *Goetler Weil & Co.*, 74 Ala. 427. Despite the fact that petitioner has been cleared of the contempt charge, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; 360 U. S. 240, as yet no hearing has been granted. The record of inordinate delays in sending down this Court's mandate, the pending and as yet unresolved second contempt adjudication, and the fact that even now, one year after the District Court dismissed the pending action on the assumption that state courts would grant an early hearing, no hearing has been set—all point to a deliberate and purposeful use of the state judicial process and procedures to deny petitioner a state forum wherein the original injunction can be tested, and the state court determination thereon be made subject to appellate review There can be no other explanation.

The District Court suggests that petitioner's remedy is by seeking review of the state court decision here through "regular appellate procedures or by extraordinary procedure ancillary to the prior remand." No regular appellate procedures can be initiated unless a hearing is granted and concluded, and this Court has shown a marked reluctance to grand mandamus. See *Deems* v. *Hickman*, 358 U. S. 57. Indeed, since the doctrine of *Jacoby* v. *Goetler Weil & Co.*, *supra*, is available to bar a hearing on the merits, the ultimate reality is that if petitioner secures a hearing, it will be only because the federal court decides to act.

The Court of Appeals seems to suggest that irreparable injury has not been shown. The facts are, however, that

petitioner's organization in Alabama has been destroyed completely. It has been forced to move its Southeast Regional Office; it is suffering a continuing loss in dues and contributions from Alabama sources. More importantly, for over five long years its former and prospective members, contributors and supporters in Alabama have been deprived of their constitutionally protected right to associate together under petitioner's aegis to advance a lawful group interest and of petitioner's assistance in helping them to combat racial discrimination in that State. Surely, these constitute irreparable damages. Indeed, where such injuries exist, it would appear that the *ratio decedendi* of *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95, would authorize the trial court to grant the relief which petitioner seeks. See *Fenner* v. *Boykin*, 271 U. S. 240.

Where there has been a lack of due process in state criminal proceedings, and the state courts have failed to provide a remedy to correct illegalities that render the state proceedings invalid, an imprisoned defendant may seek a writ of habeas corpus in the federal courts to raise and test the validity of his claims that his conviction was not consonant with the guarantee of due process secured under the Fourteenth Amendment. See, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, where this Court recognized that the existence of courts and just procedures has meaning only if they can be utilized; and *Wade* v. *Mayo*, 334 U. S. 672, 680, where it was held that there was no need for successive and unheeded applications to the state courts as a prerequisite to federal habeas corpus—"good judicial administration is not furthered by insistence on futile procedure."

Petitioner, in this case, is in the analagous position of being irreparably damaged without having a remedy in the state courts. It can look only to the federal courts for relief. Title 42, United States Code, Sections 1981, 1983, authorizes actions to be brought to redress a deprivation under color of state law of any right secured under the Fourteenth Amendment to the Constitution of the United

States, and Title 28, United States Code, Section 1343, confers jurisdiction on the federal court to hear such complaints. The rights and remedies therein provided have meaning only as they can be invoked and enforced. Here the state judiciary has refused to afford petitioner a forum to test the validity of a state court decree. Surely, the federal courts have jurisdiction under the Civil Rights Act to hear and determine the whole controversy, as it would do in an appropriate *habeas corpus* matter.

The issues raised in this petition are of far-reaching consequences. Obviously, if state process and procedures may be used to enforce penalties without those holdings being subject to a test on the merits or appellate review, the constitutional guarantee of due process becomes a sterile legalism. This was the reason this Court advised Hawkins to seek relief in the federal court, and it is submitted, this same rationale mandates a hearing in the federal court in this case.

2. The irreparably destructive nature of the damage inflicted upon petitioner by the State makes this a particularly appropriate case for the exercise of federal authority to interrupt state proceedings. Cf. *Stefanelli* v. *Minard*, 342 U. S. 117; *Douglas* v. *City of Jeannette*, 319 U. S. 157; and see, *Rea* v. *United States*, 350 U. S. 214; *Cooper* v. *Hutchinson*, 184 F. 2d 119 (C. A. 3, 1950); *Denton* v. *City of Carrollton*, 235 F. 2d 481 (C. A. 5, 1956); *Pugach* v. *Dollinger*, 275 F. 2d 503 (C. A. 2, 1960); *Jamison* v. *Alliance Insurance Co. of Louisiana*, 87 F. 2d 253 (C. A. 7, 1937); *American Optometrist Assn.* v. *Ritholz*, 101 F. 2d 883 (C. A. 7, 1939), cert. denied, 307 U. S. 647; *N.A.A.C.P.* v. *Louisiana*, 181 F. Supp. 37 (E. D. La. 1960), aff'd, 366 U. S. 293; *Crown Kosher Super Market* v. *Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), reversed on other grounds, 366 U. S. 617.

In *Stefanelli* and *Douglas*, the Court upheld lower federal court refusals to enjoin state proceedings—in each instance criminal proceedings were involved—but a close

reading of those decisions discloses not only no bar but support for petitioner's contentions. *Stefanelli* placed strong emphasis on the rules of comity and the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law . . ." (at p. 120). But no such problem is present in this case. Indeed, the basic issue here is whether federally protected rights will be enforced and the mandate of this Court effectuated.

Douglas merely decided that courts of equity in the exercise of their discretionary powers should refuse to interfere with threatened proceedings in state courts "save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent" (at p. 163). Undoubtedly, a strong factor in the "no irreparable injury" finding in that case was the fact that earlier on the same day this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105, had struck down the ordinance in question as violative of constitutional guarantees of free speech and had reversed the convictions of Jehovah Witnesses who had been prosecuted under it.

Denton v. *City of Carrollton*, *supra*, interprets the holding in *Douglas* as envisaging "itself the necessity, under circumstances of genuine and irretrievable damage, for affording equitable relief even though the result is to forbid criminal prosecution or other legal proceedings" (at p. 485).

Indeed, where "exceptional circumstances" are present, federal courts have not hesitated to interfere with state proceedings. For example, in *Rea* v. *United States*, *supra*, the Court enjoined a federal official from testifying as to illegally obtained evidence in a state criminal prosecution, even though the state's case depended wholly on such evidence. More recently, the Second Circuit in *Pugach* v. *Dollinger*, *supra*, enjoined police officers from testifying and divulging in a state criminal trial, information obtained by a wire tap. In distinguishing its action from

Stefanelli, the court concluded that ". . . the delicate balance between federal and state functions does not require the federal courts to sit idly by and countenance or acquiesce in persistent and repeated violations of federal law" (at p. 507).

A specially constituted United States District Court, in *N. A. A. C. P.* v. *Louisiana*, *supra*, enjoined state officials from proceeding in the state courts to seek to bar the organization from engaging in lawful activities in Louisiana. In *Crown Kosher Market* v. *Gallagher*, *supra*, a statutory United States District Court granted an injunction against a police chief who threatened enforcement of a Blue Sunday law. The District Court, in applying the yardstick established in *Douglas*, concluded that the more recent decision of this Court in *Ex parte* v. *Dugger*, 358 U. S. 202, made it clear that a federal court might not decline to take jurisdiction of the injunction suit " . . . when enforcement of a state criminal statute results in the denial of civil rights of a citizen and the state officials intend to enforce the statute unless and until its unconstitutionality has been finally adjudicated" (at p. 471).

The Seventh Circuit has granted injunctions halting vexatious and malicious civil actions in state courts where it was clear that the primary purposes of such suits was harassment. *Jamison* v. *Alliance Insurance Co. of Louisiana*, *supra*; *American Optometric Assn.* v. *Ritholz*, *supra*.

In each of these cases federal courts interrupted state judicial proceedings to safeguard individual rights. Indeed, the Third Circuit in *Cooper* v. *Hutchinson*, *supra*, has expressly held that the Civil Rights Act affords an implied exception to the prohibition in Title 28, United States Code, Section 2283, to the use of federal injunction to enjoin state proceedings: "The provision in the judicial code [Sec. 2283] forbidding the use of the injunction against state court action has a stated exception where a federal statute allows it, as it [Title 42, United States Code, Section 1983] does here" (at page 124).

It may well be, as Judge Tuttle pointed out in *Jacksonville Blow Pipe Co. v. Reconstruction Finance Corporation*, 244 F. 2d 394, 396 (C. A. 5, 1957), that there is a need to clarify the scope and extent of federal equity power to enjoin state proceedings in the light of the 1948 revision of the Judicial Code and the decisions of this Court.[2] The

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[2] Toucey v. New York Life Insurance Co., 314 U. S. 118, interpreted Section 265, Judicial Code, 1911, the predecessor to Title 28, United States Code, Section 2283, to mean that only in case of express statutory exceptions, *in rem* proceedings in both state and federal courts and fraudulently obtained state judgments could a federal injunction against state proceedings issue. The decision was construed as barring federal injunction to prohibit relitigation in the state courts of matters previously decided in federal courts.

The 1948 revision of the Judicial Code, according to the revisor's notes, restored the law as before the Toucey (*op. cit.*) decision. This Court, in Amalgamated Clothing Workers of America v. Richman Bros. Co., 348 U. S. 514, construed the 1948 revision as enacted to prevent the increase of judicially created exceptions to the prohibition against enjoining state proceedings. The holding itself, and basis of the majority's prohibition against an injunction by the federal courts, was its finding that the Taft-Hartley Act gave express and sole power to the National Labor Relations Board to grant the relief the union sought. However, the reference to Section 2283, cast doubt as to whether any exception other than the "relitigation" referred to in the revisor's notes is embraced under the final phrase of the statute "... where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The exceptions "expressly authorized by Act of Congress" applies to the "federal" Interpleader Act, Title 28, United States Code, § 1335, 44 Stat. 416 (1926), and has been held to apply by implication to bankruptcy, revisor's notes on predecessor to § 2283 (Sec. 265 of Judicial Code of 1911); to the 1851 Act limiting liability of ship owners, 9 Stat. at L. 635, 636; and to the Frazier-Lemke Act relating to farmers, 47 Stat. at L. 1467, 1473; see Kalb v. Feuerstein, 308 U. S. 433. Moreover, Section 2283, and its predecessors have always been held inapplicable to the statutes providing for the removal of actions from the state to the federal courts, Title 28, United States Code, § 1446(c); see Dietzsch v. Huidekoper, 103 U. S. 494. Aside from these exceptions, however, the contours of federal equity power is not clearly illuminated.

decision below, however, was based upon a finding that petitioner had not made out a case of irreparable injury. That determination, petitioner respectfully submits, should be reviewed by this Court since it finds no support in this record and conflicts with the aforementioned decisions of this Court and of lower federal courts, defining the scope of federal authority to interfere with state proceedings.

3. This case raises an issue of fundamental importance to the administration of justice and the integrity of the court process in the United States. That is, whether petitioner, after being subjected to a penalty, can obtain relief in the federal courts when state officials by procedural maneuvers and deliberate design indefinitely deprive it of redress. Indeed, the record here reveals arbitrariness in its starkest form. Whatever the merits of the State's complaint and whether the injunction now in effect is within its power, it is clear that petitioner is entitled to some forum to test the validity of the state decree and to appeal an adverse decision to a higher court. Where no such opportunity is afforded, requisite due process has been denied. This is an elemental and basic tenet of American jurisprudence.

The delay complained of here is far more serious than one in which a plaintiff is inconvenienced by a crowded court calendar. Here a penalty has been in effect for five years, and the record discloses a determination on the part of state officials to maintain the penalty, without permitting it to be subjected to test. Surely, federal courts are not powerless to act and should not be prevented from granting relief by indulging in a fictitious assumption which has long proved to be false. The procedural barrier barring a litigant adjudged in contempt from a hearing on the merits, *Jacoby* v. *Goetter Weil & Co.*, *supra*, is directly in the teeth of *Hovey* v. *Elliott*, 167 U. S. 409. *Cf. Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *National Union of Marine Cooks and Stewards* v. *Arnold*, 348 U. S. 37. Yet, petitioner has

not yet been able to raise and test its claim that this state rule and practice violates the Fourteenth Amendment guarantee of procedural due process.

Hovey, Hammond and *National Union of Marine Cooks and Stewards* emphasize that when a hearing on the merits is precluded pursuant to a judgment of contempt, due process is denied by the refusal to hear. The initiation by the State of new contempt proceeding in April, 1958, which has not yet been resolved, point to a continued reliance on the unconstitutional rule set down in *Jacoby, supra*, to bar ultimate determination of this litigation. If a state can utilize this kind of procedural barrier, a litigant may be effectively denied access to the courts whenever public officials so choose. This is the essence of the "wrong and oppression" which the *Hovey* case denounces. Whatever the merits of petitioner's constitutional claims to procedural and substantive due process, it will be afforded no forum to raise and test these claims unless and until the federal court entertains the instant complaint and proceeds to a determination on the merits.

The history of this litigation conclusively demonstrates, petitioner submits, without need of embellishment, that here a deliberate use of court process and procedures are being used to punish and destroy without hearing. Yet, it should be remembered that these proceedings were instituted by Attorney General John Patterson, now Governor of the State, who as a part of his gubernatorial campaign pledged "an all-out fight against the N.A.A.C.P." He stated, ". . . I promise you that I will continue, as I have in the Attorney General's office, to wage an all-out fight against agitators like the N.A.A.C.P. . . ."[a]

While that statement can be dismissed as the normal bombast of a politician, the Circuit Judge, before whom the case is pending, made a similar reelection campaign pledge in a televised statement, "I intend to deal with the

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[a] Southern School News, March 1958, Vol. IV, No. 9, p. 13, cols. 4, 5.

N.A.A.C.P., and its counterpart, the Montgomery Improvement Association, a blow from which they shall never recover."[4] This same judge made open attacks on the decision of this Court in *Brown* v. *Board of Education*,[5] 347 U. S. 483, and recently issued, what he must have known to be an illegal order, in light of *Morgan* v. *Virginia*, 328 U. S. 373; *Browder* v. *Gayle*, 142 F. Supp. 707 (M. D. Ala. 1956), aff'd, 352 U. S. 903; *N.A.A.C.P.* v. *St. Louis & San Francisco Ry. Co.*, 297 I. C. C. 355 (1955); *Keys* v. *Carolina Coach Co.*, 64 M. C. C. 769 (1955), barring persons from entering the State to test bus desegregation.[6]

Under the facts and circumstances revealed here, petitioner's belief that it will never be afforded an opportunity to have a hearing on the merits in the state courts can hardly be dismissed as without valid foundation. That petitioner is regarded as anathema to these state officials cannot justify a denial of elemental fairness and justice. With the State committed to a total disregard of basic and fundamental rights, petitioner's only recourse or hope of relief is in a federal forum.

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[4] Southern School News, July, 1958, Vol. V, No. 1, p. 11, col. 2. On the second contempt hearing, petitioner sought to have Judge Jones recuse himself because of these remarks, but he refused to step down.

[5] 103 Cong. Rec. A 5888, 5889 (85th Cong. 1st Sess. 1957).

[6] New York Times, May 20, 1961, p. 1, col. 5.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals Entered on May 15, 1961

JONES, Circuit Judge: In 1956 the Attorney General of Alabama brought suit in the Circuit Court of the 15th Judicial Circuit of Alabama, Montgomery County, against the National Association for the Advancement of Colored People, herein referred to as NAACP, a New York corporation, asserting that it was doing business in Alabama without qualifying as a foreign corporation, and seeking to enjoin it from conducting business and from exercising any of its corporate functions in the State of Alabama. On June 1, 1956, the day the bill of complaint was filed, the Alabama Circuit Court issued its Temporary Restraining Order and Injunction which prohibited the NAACP from conducting business, and from making application to qualify to do business, in Alabama. A demurrer to the bill was filed by NAACP, which also filed a motion to dissolve the restraining order. Before this motion was heard the State moved for the production of a large number of records and papers, including the records showing the names and addresses of the Alabama members and agents of NAACP. The court, after a hearing, entered an order requiring the NAACP to produce records and papers, including the records of its members and postponed the hearing on the motion to dissolve.

The NAACP then answered and admitted it had carried on activities and had established an office in Alabama. It denied that it was required to qualify as a foreign corporation but offered, if permitted, to do so. The production order was not complied with and for its failure the NAACP was adjudged in contempt by an order which imposed a fine of $10,000, and provided that the fine might be reduced or remitted if production was made in five days but otherwise would be increased to $100,000. The NAACP complied, so

it later contended, with the order to produce in all respects except as to the names of its members. It contended that it was protected by the United States Constitution from the making of this disclosure. A modification of the restraining order and a stay pending appeal were sought and denied. An application for a stay order was made to the Supreme Court of Alabama. While this application was pending the Circuit Court made a further contempt order and increased the fine to $100,000. The NAACP was not permitted, it seems, under the law of Alabama, to have a hearing on its motion to dissolve the restraining order until it had purged itself of contempt. The Supreme Court of Alabama refused to review the contempt judgment. Ex parte National Association for the Advancement of Colored People, 265 Ala. 699, 91 So. 2d 221; Id. 265 Ala. 349, 91 So. 2d 214.

The Supreme Court of the United States granted certiorari and held that, on the record before it, the State could not require the production of the names of members and that the fine for contempt must fall. *National Association for the Advancement of Colored People* v. *State of Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488. The NAACP, in addition to asserting a constitutional immunity from disclosing the names of its members, attempted to challenge the validity of the restraining order. The Supreme Court declined to consider this question, saying:

> "The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here." 357 U. S. 449, 466.

The Supreme Court of Alabama, on the remand from the Supreme Court of the United States, "again affirmed" the contempt judgment or the ground that the United States

court had been mistaken in considering that the NAACP had complied with the production order except for refusal to produce its membership lists. Ex parte National Association for the Advancement of Colored People, 268 Alabama 531, 109 So. 2d 138. In a per curiam opinion, the Supreme Court of the United States held that the State was precluded from making the contention that the NAACP had failed to comply with the production order otherwise than with respect to the records of its membership. The judgment of the Supreme Court of Alabama was reversed. *National Association for the Advancement of Colored People* v. *Alabama*, 360 U. S. 240, 79 S. Ct. 1001, 3 L. Ed. 2d 1205. The NAACP had applied to the Supreme Court of the United States for a writ of mandamus to compel the Supreme Court of Alabama to comply with the mandate in the earlier case. This was decided in the same opinion as that dealing with the contempt judgment. The court refused to issue a writ of mandamus. In the concluding paragraphs the court said:

> "Upon further proceedings in the Circuit Court, if it appears that further production is necessary, that court may, of course, require the petitioner to produce such further items, not inconsistent with this and our earlier opinion, that may be appropriate, reasonable and constitutional under the circumstances then appearing.
>
> "We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U. S. at 466, 467, and, therefore, deny petitioner's application in No. 674, Misc., [NAACP v. Honorable J. Ed Livingstone, Chief Justice of the Supreme Court of Alabama, et al.] for a writ of mandamus." 360 U. S. 240, 245.

This decision of the Supreme Court became final upon the denial of a petition for rehearing on October 12, 1959. In response to the efforts of the NAACP to get the Supreme Court of Alabama to send down its mandate to the Circuit Court, the Clerk of the Alabama Supreme Court advised counsel for the NAACP "that this case will receive attention as soon as practicable, commensurate with the rest of the important business of the court." The cause in the United States District Court for the Middle District of Alabama resulting in the judgment from which this appeal was taken was commenced by the filing of a complaint by the NAACP on June 23, 1960. On July 11, 1960, the Supreme Court of Alabama remanded to the Circuit Court the cause remanded to it by the Supreme Court of the United States. In its order the Supreme Court of Alabama directed that the temporary injunction remain in full force pending final determination of the cause on the merits. Ex parte National Association for the Advancement of Colored People, ... Ala. ....., 122 So. 2d 396.

Meanwhile there was other activity in the State Circuit Court. On April 9, 1958, the State filed a petition charging a violation of the restraining order by organizing or controlling the Alabama State Coordinating Association for Registration and Voting, which association was, the State asserted, a device and subterfuge to cover and hide operations by the NAACP which were enjoined by the restraining order. The State prayed that the NAACP be required to show cause why the NAACP should not be held in contempt for violating the restraining order by reason of this conduct. The NAACP filed a motion to dismiss the petition, primarily on jurisdictional grounds. We are not informed or any ruling on the motion to dismiss. In February 1960, while the original contempt matter was in the Supreme Court of Alabama with its mandate to the Circuit Court deferred because of other "important business of the court," the State propounded to the NAACP forty-two interrogatories with respect to its connection with the Alabama

State Coordinating Association for Registration and Voting. We are not informed as to whether these interrogatories have been either answered or made the subject of objections or other attack.

In the complaint filed by the NAACP in the Federal District Court against the Attorney General and the Secretary of State of Alabama, it is asserted that the legal proceedings brought against it in the State Court are arbitrary and vindictive and hence in violation of due process of law, that no other action has been taken to oust from the State a foreign corporation which had failed to register and the discrimination against it was because of its promotion of equal rights and the eradication of distinctions based upon race. It is alleged in the complaint that, without a hearing, the NAACP was required to close its office in Birmingham, that it suffered the loss of membership and income from members and contributors in Alabama, and that its members are deprived of the right of voluntary association and the right to seek the privileges guaranteed by the Constitution and laws of the United States. An injunction was sought to restrain the Attorney General from proceeding to enforce the State Court restraining order or taking any other action to oust the NAACP from Alabama, and to enjoin the Secretary of State from refusing to register the NAACP as a foreign corporation. There was also a prayer to enjoin interference with the legal and constitutionally protected rights of the NAACP and its members.

The Attorney General and the Secretary of State moved to dismiss on the ground that the federal court lacked jurisdiction and that the contempt matter was, pursuant to the mandate of the Supreme Court of Alabama, again in the Circuit Court. The district court granted the motions to dismiss and, in an opinion filed on August 11, 1960,[1]

[1] NAACP v. Gallion, Attorney General of the State of Alabama, 190 F. Supp. 583.

set forth the principles which it felt were decisive of the questions presented. The district court had no doubt but that federal jurisdiction might here be invoked to redress the deprivation of rights, privileges, or immunities guaranteed by the Constitution or laws of the United States. It was the view of the district court, however, that it should not, under the circumstances, exercise that jurisdiction. The reasoning of the district court was thus expressed:

> "The real basis for plaintiff's seeking this Court's aid is the alleged unconstitutional action by the Courts of Alabama in not proceeding promptly; but the effect of the delayed action and 'dilatory tactics' is to deprive the plaintiff-corporation of its constitutional right to do business in the State of Alabama and to do so without the plaintiff-corporation having the right to obtain rulings upon and, if necessary, a review of those rulings upon the several constitutional issues raised.
>
> "It should be noted that in this case the Supreme Court of the United States refused to pass on the constitutional issues raised by this plaintiff-corporation. The Court there said that the constitutional issues were not properly before it, and remanded the case to the state Courts for further proceedings. N.A.A.C.P. v. Alabama, supra, [357 U. S. 449]. In making this determination, the Supreme Court recognized that the ultimate aim and purpose of the litigation is to determine the right of the State to enjoin petitioners from doing business in Alabama.
>
> "It should also be noted that the Supreme Court in its last treatment of this litigation even went so far as to indicate to this plaintiff-corporation the route open to it in securing a prompt trial and review if appropriate.
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> • • •

"If this assumption as made by the Supreme Court was or is erroneous, the proper remedy in this particular case is to that Court by regular appellate procedures or extraordinary procedure ancillary to the prior remand.

"In addition to the above, it must be recognized that there are certain instances when a federal Court should not exercise its jurisdiction, and this is particularly true in a case where an action is in the breast of a state Court and one of the litigants in that case seeks to invoke the injunctive powers of the federal Court. Stefanelli v. Minard, 342 U. S. 117, and the authorities therein cited.

"This Court must and does now assume that the public officials for the State of Alabama (the judicial officers concerned with the case now pending in the state Courts, as well as the two officers that are parties to the present litigation) recognize that they are just as solemnly committed by their oaths taken pursuant to Article VI, Clause 3, of the Constitution of the United States to protect the constitutional rights of all citizens, as is this Court. It would be necessary for this Court to assume otherwise in order to justify granting plaintiff the relief it seeks."

The appellant, the NAACP, states its specification of error in an unusual but adequate way by stating that, "The District Court erred in failing to recognize that the infringement of constitutional rights suffered by appellant and its membership can be redressed only by the federal court exercising its jurisdiction, hearing this case on the merits, and granting the requested injunction prohibiting appellees from further barring appellant from conducting its lawful activity within the State of Alabama." It is stated on behalf of the NAACP, in its brief and argument, that the public officials of Alabama, including its

judiciary, are committed to a policy of maintaining racial segregation at all costs, including, if need be, defiance of federal authority. The NAACP is, so it says, a prime object of attack by the officials of Alabama. To persuade us of this so-called "Climate in Alabama" the NAACP inserts in its brief some thirty references to and quotations from Southern School News. We are unable to take judicial notice either of these excerpts or of the facts which they purport to relate. We are not convinced that we must say, as the NAACP insists, that its "remedy in the State courts is not merely inadequate, it is non-existent." The Supreme Court has suggested that "The proper method for raising questions in the State appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal," say the Supreme Court, "can review be sought here." The Supreme Court and the district court have assumed that the Alabama courts will proceed in the discharge of their duty to decide this litigation with reasonable dispatch. It is implicit in the assumption of the Supreme Court and expressed in the assumption of the district court that the State of Alabama and its officers, judicial as well as executive, will recognize and give effect to the federally guaranteed rights of litigants before its courts. We do not think we should indulge in a different assumption. If, as the NAACP fears, the Alabama courts render a judgment which deprives it of a constitutional right, the judgment may be reviewed and corrected by the Supreme Court of the United States. If, as the NAACP suggests as probable, the Alabama courts raise or sanction unjustifiable barriers to a determination of issues, or resort to other deliberate judicial foot-dragging, the NAACP will not be, as we will point out, deprived of a remedy.

The Supreme Court has, on many occasions, stated the principle that federal courts should refrain from determining constitutional questions arising from the interpretation

and application of state statutes until the state courts have been afforded a reasonable opportunity to pass upon them. We think this is a case to which the stated principle applies. The NAACP is a New York corporation and does not deny that it has been doing business in Alabama without qualifying under State laws as a foreign corporation, although protesting that qualification is not required of it. The right, asserted by the State to oust NAACP and the right, asserted by NAACP, to qualify as a foreign corporation in the State, are matters which should be first litigated in the State court. In *Harrison, Attorney General* v. *National Association for the Advancement of Colored People*, 360 U. S. 167, 79 S. Ct. 1025, 3 L. Ed. 2d 1152, abstention was directed although the case involved a Virginia statute which the district court found was enacted to impede school integration and nullify the effect of *Brown* v. *Board of Education*. More reason here exists, we think, for giving the State courts an opportunity for determining the questions than were present in the Harrison case.

We entertain no doubt but that the district court had jurisdiction to entertain a complaint seeking an injunction against officers of a state to prevent the deprivation of or interference with a right created or guaranteed by the United States. But this should not be done unless there is a danger of irreparable injury which is imminent. *Fenner* v. *Boykin*, 271 U. S. 240, 46 S. Ct. 492, 70 L. Ed. 927. Only manifest oppression will justify the interference by a federal court with state administrative officers acting under color of office in a good faith effort to perform their duties. *Hawks* v. *Hamill*, 288 U. S. 52, 53 S. Ct. 240, 77 L. Ed. 610. There must be an exceptional circumstance and a clear showing of a necessity for the protection of constitutional rights for an injunction to justify interference by the issuance of the writ. *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 55 S. Ct. 678, 79 L. Ed. 1322. Such a necessity appeared in *City of Houston* v. *Jas. K. Dobbs Co.*, 5th Cir. 1956, 232 F. 2d 428. The judicial doctrine of

abstention, invoked in cases such as this, is in keeping with the spirit, although not required by the letter, of the Anti-Injunction Act.[2] This principle is exhaustively explored in *T. Smith & Son, Inc.* v. *Williams*, 5th Cir. 1960, 275 F. 2d 397, and need not be further discussed here.

The district court entered an order of dismissal. This it should not have done. Jurisdiction should have been retained so that in this action or in such supplemental proceedings as may be initiated the appellant may be protected, as in the *Harriman* case; and to take such steps as may be required for the just disposition of the litigation should anything prevent a prompt state court determination as was provided in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058, reh. den. 360 U. S. 940, 79 S. Ct. 1442, 3 L. Ed. 2d 1552 See also *Martin* v. *Creasy*, 360 U. S. 219, 79 S. Ct. 1034, 3 L. Ed. 2d 1186; *County of Allegheny* v. *Mashuda Co.*, 360 U. S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163; *City of Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639, 79 S. Ct. 455, 3 L. Ed. 2d 562.

The situation here is not, we think, comparable with that presented in *Hawkins* v. *Board of Control*, 5th Cir. 1958, 253 F. 2d 752. There Hawkins, a Negro, had been unsuccessfully attempting to obtain admission to the University of Florida Law School.[3] In its opinion reported in 350 U. S. 413, the Supreme Court held that Hawkins was entitled to admission under the rules and regulations applicable to other qualified candidates, and the cause was re-

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[2] A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C.A. § 2283.

[3] Hawkins v. Board of Control, 47 So. 2d 608; Id. 53 So. 2d 116, cert. den. 342 U. S. 877, 72 S. Ct. 166, 96 L. Ed. 659; Id. 60 So. 2d 162, rev. 347 U. S. 971, 74 S. Ct. 783, 98 L. Ed. 1112, 350 U. S. 413, 76 S. Ct. 464, 100 L. Ed. 186, Id. 83 So. 2d 20, cert. den. 350 U. S. 413, 76 S. Ct. 464, 100 L. Ed. 486; Id. 93 So. 2d 354, cert. den. 355 U. S. 339, 78 S. Ct. 20, 2 L. Ed. 2d 49.

manded. The Supreme Court of Florida, quoting from Washington's Farewell Address, and undertaking to exercise a judicial discretion, denied Hawkins the right to enter the University and gave him the privilege of renewing his motion if he could show that his admission could be accomplished without doing great public mischief. The Supreme Court denied certiorari without prejudice to Hawkins' right to seek relief in an appropriate United States district court. 355 U. S. 839. Hawkins instituted suit in a district court seeking admission to the school on the same basis as other qualified candidates. The district court refused to receive evidence on Hawkins' application for a preliminary injunction and denied the injunction. This Court reversed and directed a prompt hearing. *Hawkins* v. *Board of Control*, 5th Cir. 1958, 253 F. 2d 752. No question of abstaining to permit further state court litigation was in the case.

We are in agreement with the district court's decision that this matter should be litigated initially in the courts of the State. But for the reasons here set forth, the judgment will be vacated and the case remanded to the district court with instructions to permit the issues presented to be determined with expedition in the State courts, retaining jurisdiction meanwhile for the purposes here stated. The conclusions which we have stated are not to be regarded as holding or suggesting that each of the matters alleged in the complaint would constitute, if proven, a violation of a right which is protected by the Federal Constitution or congressional enactments. We do hold that federal questions are raised by the complaint.

Vacated and Remanded.

TUTTLE, Chief Judge, CONCURRING IN PART AND DISSENTING IN PART.

With deference to the views of my colleagues, I must dissent from that part of the opinion that affirms the action of the trial court in not proceeding to hear the case presented to it on the merits. I, of course, concur in all the propositions of law which are so well stated in the Court's opinion. My disagreement arises from the fact that the history of the litigation in the state courts has demonstrated that at the time of the filing of the within complaint the state courts were not affording the complainant reasonable opportunity to be heard on the merits of its complaint that it was being illegally deprived of its right to qualify as a foreign corporation under the Alabama laws.

The nub of the majority opinion I think is contained in the following statement:

> "The Supreme Court has, on many occasions, stated the principle that Federal Courts should refrain from determining constitutional questions arising from the interpretation and application of state statutes until the state courts have been afforded a reasonable opportunity to pass upon them. We think this is a case to which the stated principle applies."

I think, with all deference, that this is a case to which the stated principle does *not* apply.

The Supreme Court, as pointed out in the majority opinion, in denying appellant's petition for mandamus said:

> "We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings." 360 U. S. 240, 245.

The assumption thus made by the United States Supreme Court has now clearly been proved to be incorrect. This

record shows that although the Supreme Court of the United States finally disposed of the matter by a denial of a petition for rehearing on October 12, 1959, and in spite of efforts by the appellants to get the Supreme Court of Alabama to send down its mandate to the state trial court, the Alabama Supreme Court had failed more than eight months later to perform this simplest of ministerial acts, that is, to send down the mandate to the Circuit Court. In the meantime appellant was denied any opportunity to move towards a trial of the validity of the original injunction, already in effect for three years. No effort was made upon the hearing below to show how such an unparalleled delay in the performance of a normal clerical duty was justified. In the absence of such justification, I think that there is but one conclusion possible; the State Supreme Court *did* "fail to proceed promptly with the disposition of the matters left open under [the United States Supreme Court] mandate for further proceedings," thus removing the basis assigned by that Court for its refual to grant appellant's application for a writ of mandamus.

In such circumstances as this, I think the course of litigation in *Hawkins* v. *Board of Control*, the history of which is portrayed by the citations of its appearance in the Florida courts and the United States Supreme Court in footnote 3 of the majority opinion, teaches us that the matter is ripe for decision by a United States District Court. In the Hawkins case, the question of the admission of Hawkins to the University of Florida law school was pending in the State Supreme Court, following a decision of the United States Supreme Court holding that no further basis appeared for denying him such admission. Following another denial of his admission by the State court, which expressly retained jurisdiction, Hawkins applied to the United States Supreme Court for certiorari. The Supreme Court denied the application for certiorari "without prejudice to the petitioner's seeking relief in an appropriate United States District Court."

The United States Supreme Court thus not only approved, but itself suggested, a procedure for permitting a complainant who considered that he was being shunted aside for inordinate delays in the State courts to have the matter inquired into on the merits in a United States District Court.

In this case, I would have not the slightest doubt that the failure of the Alabama Supreme Court to make possible further proceedings in that State's trial court by its failure to take the simple ministerial act of sending down the mandate for a period of more than eight months, and then sending it down only after suit was filed in the United States Court, presented a classic example of a case in which the assumption that the State court would act promptly to permit a trial of the rights of an aggrieved party has been demonstrated to be false.

I, of course, agree that the judgment of dismissal must be reversed and set aside. I disagree with my colleagues only in that I think the trial court should have proceeded to a hearing on the merits of the complaint without requiring the appellant to participate further in the fiction that it had an opportunity to have a reasonably prompt hearing in the State courts.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, MacDonald Gallion, Attorney General of Alabama and Mrs. Bettye Frink, Secretary of State, State of Alabama, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Tuttle, Chief Judge, concurs in part and dissents in part."